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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 73-1267

MICHAEL S.,

Petitioner,

-against-

THE CITY OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT & APPENDIX

JONATHAN A. WEISS
TONY GOLICK
Counsel for Petitioner
2055 Broadway
New York, NY 10023

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TOBY GOLICK
Counsel for Petitioner
2095 Broadway
New York, NY 10023

INDEX

Opinion Below	ii
Jurisdiction	ii
Questions Presented	iii
Statement of the Case	1
Reasons for Granting the Writ	4
I. The Failure To Expunge Juvenile Arrest Record where Juvenile Is Found Not Guilty Ultimately Destroys his Constitutional Right to Presumption of Innocence	9
II. The Maintenance of a Family Court Juvenile Arrest Record Severely Hampers Employment and Career Possibilities	16

III. Failure to Expunge Juvenile Arrest Record where Juvenile Is Found Not Guilty Ultimately Violates His Constitutional Right to Privacy 27

Conclusion 30

Appendix

Order of New York State Court of Appeals App. 1

Order of Appellate Division, First Dept. denying leave to appeal App. 3

Order of Appellate Division, First Dept. affirming judgment of Family Court App. 5

Order of New York City Family Court App. 7

Notice of Motion and and Affidavit New York City Family Court App. 8

CITATIONS

Cases:

Bilick v. Dudley, 356 F. Supp. 945 (SDNY (1973) 28

Coffin v. United States, 156 U.S. 432, 453 (1894) 12

Eddy v. Moore, 487 P. 2d 211 28

Griswold v. Connecticut, 381 U.S. 479 (1965) 27

In Re Gault, 387 U.S. 1 (1967) 14, 15

Henry v. Looney, 65 Misc. 2d 759, 317 NYS 848 (Sup. Ct.) Nassau Co. 1971) 7, 11, 24

Ivan V. v. New York City, 407 U.S. 203 (1972) 1

McKeiver v. Pennsylvania, 403 U.S. 528 (1971) 6, 8, 15

In Re Michael S., N.Y.L.J. October 3, 1972 pg. 18 col, 12 1

Richard S. v. City of New York, 32 NY2d 592 (1973) 10, 23

In Re Richard S, 27 NY2d 802 (1970) 1

In Re Smith, 63 Misc. 2d 198, 310 NYS2d 617 (Family Court, NYC, 1970) 7, 20

Speiser v. Randall, 357, U.S. 323 (1958) 13

Stanley v. Illinois, 405 U.S. 645 (1972) 13

States v. Kalish, 271 F. Supp. 968, 970 (D.P.R. 1967) 28

In Re Winship, 397 U.S. 358 (1970) 1, 9, 15

State Statutes:

Family Court Act
§166 19
§781 19
§782 19
§783 19, 24
§784 19, 22

Regulations of the New York City Police Department (Ch. 2 Par. 60) 19, 22

Other Authorities:

The Challenge of Crime in a Free Society (President's Commission on Law Enforcement, 1967) 17

Gough, "Expungement of Adjudication Records of Juvenile and Adult Offenders" 1966 WASHINGTON UNIV. L. QUARTERLY 145 16

Note, "Juvenile Delinquent: The Police, State Courts, and Individualized Justice" 79 HARVARD L. REV. 775 (1966) 20

Nussbaum, First Offenders: A Second Chance (1956) 17

Sparer, "Employability and the Juvenile 'Arrest' Record" (Study of Unemployed Youth, N.Y.U. Grad. School of Social Work 1966) 16

Sussman, "Confidentiality of Records on Juveniles in Family Court" N.Y. LAW JOURNAL January 6-8, 1971 17, 21, 23

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TOBY GOLICK
Counsel for
Petitioner
2095 Broadway
New York, NY 10023

The petitioner, MICHAEL S, respectfully prays that a writ of certiorari issue to review the judgment of the New York State

Court of Appeals entered in this proceeding on November 21, 1973.

Opinion Below

The New York State Court of Appeals denied petitioner permission to appeal without opinion. There was no opinion in the Appellate Division First Department or in the New York City Family Court.

Jurisdiction

The judgment of the New York State Court of Appeals was entered on November 21, 1973. This petition for certiorari was issued within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

The determination that Michael S. was a Person-in-Need-of Supervision was reversed on appeal, for failure to prove guilt beyond a reasonable doubt. Michael S. then sought to have his court and police records expunged. The New York courts denied any relief. The questions presented are:

(1) Is the maintenance of highly prejudicial police and court records on juveniles found not guilty of any misconduct a penalty denying equal protection and due process of law?

(2) Is the maintenance of highly prejudicial police and court

records on juveniles found not guilty an impermissible infringement on the petitioner's right to privacy?

STATEMENT OF THE CASE

Petitioner, Michael S., at age 12 was adjudicated a Person in Need of Supervision (PINS) and put on probation for one year. This determination was appealed to the Appellate Division of the New York Supreme Court and was reversed on reargument, In Re Michael S., N.Y.L.J. October 3, 1972, p. 18, Col. 12, because the original decision had not been based upon proof beyond a reasonable doubt as required by Matter of Winship, 397 U.S. 358 (1970), In Re Richard S., 27 N.Y. 2d 802 (1970) and Ivan V. v. New York City, 407 U.S. 203, 92 Sup. Ct. 1951 (1972).

At the time of this reversal, MIchael S. had already completed his probationary period. His only contact with the police and courts has been in matters relating to the defective PINS determination and the probation attached to it.

Michael S. is now a senior in high school. Upon graduation, he hopes to be admitted to Westchester Community College or one of the New York City Community Colleges. Michael S. wants to prevent his brief Family Court involvement from hindering both his future educational plans and future employment opportunities.

A motion to expunge Michael S.'s court and police records was

made in Family Court, New York County on March 21, 1973. This motion was denied without opinion by Judge Manual G. Guerreiro on March 28, 1973. The denial was affirmed without opinion by the Appellate Division, First Department. The Court of Appeals denied leave to appeal on November 21, 1973, without opinion or reference.

Reasons for Granting the Writ

Petitioner, a college bound high school senior, was acquitted on appeal of charges of misconduct at age twelve. Despite the serious prejudicial effect of petitioner's Family Court and police arrest records on his future employment and educational opportunities, the New York State courts have totally denied his application to expunge these records.

What post-acquittal relief should be granted petitioner and the thousands of other youngsters acquitted each year either on appeal or at trial

throughout the country?[1] The petitioner will be substantially prejudiced by the New York courts' refusal to grant him relief. A record of Family Court and police involvement, even though it indicates an acquittal or withdrawal of charges has been shown to create a permanent disability to future employment and education (see pages 16 through 26 infra).

A major purpose of creating

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[1] The numbers of youths affected is staggering. In New York City alone, of the 3,280 Persons in Need of Supervision and 7,776 Juvenile Delinquency petitions filed between January and November, 1973, 1,573 of the PINS and 3,907 of the J.D.s were withdrawn or dismissed. No statistics were available from the Family Court as to the number of adjudications reversed on appeal.

a separate forum for juvenile cases is to help youngsters in trouble early and thereby avoid their becoming involved in patterns of crime as adults. A bargain is struck between the juvenile and Family Court in which the juvenile surrenders certain rights under the adversary system (i.e., right to trial by jury) for the benefits of "an intimate, informal protective proceedings," (emphasis added). McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971). It is the antithesis of the Family Court's protective rehabilitative and preventative goals, as well as a breach of the trust created by the special

relationship between juveniles and the courts, to maintain useless and highly prejudicial records on an exonerated youth.

This case is of public importance both in its effect on the fair administration of the juvenile justice system and in the numbers of persons affected by its outcome. Decisions involving expunction have set forth confusing inconsistent standards even within the same jurisdiction. See, e.g., In Re Smith, 63 Misc. 2d 198, 310 N.Y.S.2d 617 (Family Court, NYC, 1970); Henry v. Looney, 65 Misc. 2d 759, 317 NYS 848 (Sup. Ct. Nassau Co. 1971). As will be demonstrated, the state court decision in the instant case

interferes with the constitutional rights of due process, equal protection and privacy by reversing the presumption that the exonerated juvenile is innocent, and punishing him for life with the stigma of a harmful record. The juvenile experiment continued in McKeiver v. Pennsylvania, supra, requires this Court's guidance on how Family Courts are to protect these constitutional rights of the youths who come before it and ensure that the benefits promised are in fact extended.

I. The Failure To Expunge Juvenile Arrest Record where Juvenile Is Found Not Guilty Ultimately Destroys his Constitutional Right to Presumption of Innocence.

The finding that petitioner was a Person in Need of Supervision (PINS) was reversed not on a technicality, but because the state failed to meet the burden of proving guilt beyond a reasonable doubt. Proof beyond reasonable doubt is a fundamental constitutional safeguard - a barrier the state has to overcome to limit a person's freedom by sanctions and the stigma of a "record," In Re Winship, 397 U.S. 358, 367 (1970). In petitioner's case, it has been held specifically that the state did not meet this burden. Having

failed to surmount this barrier, the court cannot act as it did, by continuing to stigmatize the petitioner.

Under a New York State Court of Appeals decision, the acquitted juvenile seeking to protect himself from the practical stigma of his Family Court and police records must reprove his innocence at an even higher level than was required to obtain his original acquittal. In Richard S. v. City of New York, 32 NY2d 592 (1973) which denied a request for relief almost identical to that sought by the petitioner, the Court of Appeals cited and implicitely adopted a lower court's rationale that "when an arrest

fails to terminate with an adjudication for reasons other than complete innocence, expunction might be inappropriate"[2] (emphasis added), at 595, citing Henry v. Looney, supra. In requesting expungement, petitioner clearly asked the court to fashion or suggest some appropriate remedy. No relief whatsoever was offered by any New York Court.

[2] The court affirmed the denial of expunction without prejudice to Richard S's requesting the Family Court seal his records. Whether or not even sealing was appropriate under its new standard of a "complete innocence" was left by the Court of Appeals to the sole discretion of the Family Court Judge. The petitioner's application for expungement was in the appellate process at the time of the Richard S. decision. In denying petitioner permission to appeal, the Court of Appeals did not even extend to him the opportunity to petition the Family Court for sealing.

In essence, the Court of Appeals said that some innocent juveniles are less innocent than others. This concept of levels of innocence is totally alien to our basic criminal justice system in which only a conviction carries legal significance as to a person's involvement in criminal behavior. Our law knows no degrees of innocence.

> The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and, its enforcement lies at the foundation of the administration of our criminal law.
> Coffin v. United States, 156 U.S. 432, 453 (1894).

By the time petitioner's (PINS) adjudication was reversed, he had already completed his year

of probation. Although petitioner was already found not guilty, now for expungement the burden of proof has shifted so that he must prove his total innocence in order not to be punished further.[3] There are three stages at which the juvenile can clear himself of the charges against him: withdrawal of the petition before trial, acquittal at trial, or reversal on appeal.

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[3] "Of course, the burden of going forward with the evidence at some stages of a criminal trial may be placed on the defendant, but only after the State has 'proved enough to make it just for the defendant to be required to repell what has been proved...' Speiser v. Randall, 357 U.S. 513, 524 (1958). Stanley v. Illinois, 405 U.S. 645 (1972), held that the unwed father could not be presumed to be unfit to rear his children, and placed the burden of proof on the state. The juvenile is entitled to the same protection from unjustified stigma.

There is no legal basis to conclude that a person tried and acquitted at trial or on an appeal is more guilty than someone who is arrested but never tried. To say otherwise is to deny the fundamental doctrine of presumption of innocence and the basic constitutional concept that this is a society of innocent individuals always treated as such until proven guilty. In developing due process safeguards, this Court has insisted on providing the juvenile an atmosphere orderly enough to insure a serious impartial proceeding and yet informal enough to preserve the substantive benefits of the juvenile process. Cf. In Re Gault,

387 U.S. 1 (1967); McKeiver v. Pennsylvania, supra. Recognizing the extreme harm resulting from the failure to keep records confidential, the states have been encouraged to provide and improve provisions for the confidentiality of records of police and court contacts with juveniles. Cf. Gault, supra, at 24-25. Instead, the New York court has increased the burden on an acquitted youngster by requiring a higher level of innocence for expungement than this Court has required for guilt under Winship, supra.

II. The Maintenance of a Family Court Juvenile Arrest Record Severely Hampers Employment and Career Possibilities.

The Family Court and police records will be a permanent obstacle to the petitioner when he seeks future employment and higher education. The prejudice resulting from arrest and court records has been well documented, see Sparer, "Employability and the Juvenile 'Arrest' Record" (Published by Center for Study of Unemployed Youth, N.Y. Univ. Grad. School of Social Work, 1966); Gough, Expungement of Adjudication Records of Juvenile and Adult Offenders WASH. UNIV. L.Q. (1966), 156, at 170-4. For example, 75%

of the employment agencies in New York City do not refer any applicant they know to have a record, regardless of final disposition, The Challenge of Crime in a Free Society (Pres. Comm. on Law Enforcement, 1967) at 75. Colleges and apprenticeship programs often inquire into juvenile police records, Nussbaum, First Offenders: A Second Chance, 4 (1956). A juvenile record may impede entry into the Armed Forces (see Gough, supra, at 156).

According to a study done by Alan Sussman, appearing in the New York Law Journal, January 6-8, 1971, "Confidentiality of Records on Juveniles in Family Court,"

many governmental agencies require information on applicants' Family Court records, including the FBI, Civil Service, Army, Navy, Marines, Air Force, New York City Taxicab (Hack) License Bureau, Department of Public Welfare, New York City Police and Fire Departments, United States Post Office, and New York State Department of Motor Vehicles. This information is often a prerequisite for employment. Most city agencies, as will be demonstrated, have access to these files, unknown to potential applicants. This makes the resulting prejudice considerably more dangerous and frustrating to applicants, because the reason for their rejection is unknown or

cannot be proved.

Private firms and corporations are equally interested in an applicant's past legal history. Such diverse organizations as the Red Cross, New York Telephone Company, Con Edison, New York University, First National City Bank, and Merrill, Lynch, Pierce, Fenner & Smith all require such information from applicants, as Mr. Sussman's article reports.

There are some legislative restraints on the availability of police and court records to potential employers (Family Court Act, §§166, 781, 782, 783, 784; Regulations of New York City Police Department, ch. 2 par. 60). However, as noted in

In Re Smith, supra, a Family Court case granting expungement, these measures are of little practical consequence. Employers can cause a potential employee to waive rights of confidentiality as a condition of considering his application, and such records are unquestionably available as to applications for employment in the New York City Housing, Transit, Police and any other "uniformed service," as well as to applications for hack licenses and regular drivers' licenses. As summarized in Note, 79 Harv. L. Rev. 775 (1966) at 800, "the results of [statutory classification of juvenile records as confidential]

have been so unsatisfactory that it may fairly be characterized as a failure."

The Sussman article, supra, demonstrates how the government agencies already mentioned have general access to court files. His sources are the clerks he interviewed in the various Family Courts in New York City. These interviews reveal that the Family Court generally allows the Bureau of Child Welfare and the Police Department free access to juvenile records with or without the individual's consent. According to a Family Court clerk, requests from other public agencies, like the FBI or Department of Social

Services are forwarded to the clerk for "individual" determination; presumably at his discretion.

Police practices are similar regarding their records, even though they are specifically limited by §784 of the Family Court Act. In fact, NYC Police Department regulations make explicit exceptions for the release of information on the discretion of the commanding officer to New York City Department of Personnel, U.S. Civil Service Commission, State Liquor Authority, and any city agency as to any incumbent employee. Regulations of New York City Police Department, Ch. 2, par. 60.

Private firms and corporations

cannot obtain records as easily by themselves so they often require applicants to secure and disclose such information as a pre-condition to employment, thereby rendering the guarantees of confidentiality meaningless. For example, the New York Telephone Company, after questioning applicants about their legal history, requires them to sign a disclaimer, allowing the company to conduct "any investigation it deems necessary." Sussman article, supra.

Two New York cases have proposed as a remedy the sealing of records with inspection permitted only upon the juvenile's application to the courts. Richard S. v. City of NY, supra.

Henry v. Looney, supra. However, even this method will not shield the petitioner when he applies for positions where disclosure of his records is made a pre-condition for employment consideration.

Other irreparable damage is not even covered by the supposed protections of confidentiality. Another court may receive and consider Family Court records when imposing sentence after an adult confiction. Family Court Act §783.

Thus, the guarantees of confidentiality are of no practical effect. The burden on the Family Courts and police of removing petitioner's name from their files is minimal. There is no public interest from a law enforcement

standard in maintaining these records, and at no stage of the state court proceedings did the respondent attempt justification of its opposition.

This physical obliteration is a very simple matter. It does not involve basic and massive reforms, nor does it require extensive administrative action with high costs and a wholesale revision of the Court's record keeping systems. Only the unjustified and misleading records need be expunged. In contrast, social and economic sanctions on petitioners are excessive. It is a denial of basic due process to maintain court and police records

which continuously punish the innocent petitioner.

III. Failure to Expunge Juvenile Arrest Record where Juvenile Is Found Not Guilty Ultimately Violates His Constitutional Right to Privacy.

The widespread, unchecked dissemination of information and records that create misleading inferences of the juvenile's bad character, misconduct or guilt is an invasion by the Family Court of the juvenile's privacy. Privacy is a fundamental right guaranteed under the Constitution. Griswold v. Connecticut, 381 U.S. 479 (1965). Those courts which have granted expungement have recognized that the infringement on the acquitted person's constitutional right to privacy far outweighed what was at

best a minimal law enforcement tool. As stated in United States v. Kalish, 271 F. Supp. 968, 970 (S.P.R. 1967) the preservation of misleading arrest records "constitutes an unwarranted attack upon his right of privacy; it violates his dignity as a human being." Eddy v. Moore, 487 P.2d 211; Bilick v. Dudley, 356 F. Supp. 945 (SDNY 1973).

The infringement on privacy and affront to dignity is particularly heinous in the context of a juvenile case. Petitioner's brief involvement with the Family Court and police at age twelve will haunt him throughout his employable years.

Instead of aiding juveniles by shielding them from the harshness of the adult criminal process, the Family Court has gone full cycle to impede the progress of the acquitted youngster.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment of the New York State Court of Appeals.

Respectfully submitted,

TOBY GOLICK
JONATHAN A. WEISS
Counsel for Petitioner
2095 Broadway
New York, NY 10023

STATE OF NEW YORK

IN COURT OF APPEALS
At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the twenty-first day of November A.D. 1973.

PRESENT, HON. STANLEY H. FULD, Chief Judge, presiding.

Mo. # 927

In the Matter of Michael S., a Person Alleged to be a Juvenile Delinquent,

Movant-Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and

due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

A copy

/s/ James M. Flavin
Clerk

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on September 25, 1973.

Present - Hon. Arthur Markewich, Justice Presiding, Emilio Nunez, Myles J. Lane, Aron Steuer, Louis J. Capozzoli, Justices.

In the Matter of	x	
Michael S.	:	
a person alleged to be a juvenile delinquent,	:	M-2542
Respondent-Movant-Appellant.	:	
	x	

The above named respondent-movant-appellant having moved for leave to appeal to the Court of Appeals from the order of this

Court entered on June 12, 1973,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Jonathan A. Weiss in support of said motion, and the affidavit of Alfred Weinstein in opposition thereto, and after hearing Mr. Jonathan A. Weiss for the motion, and Mr. Alfred Weinstein opposed,

It is ordered that said motion be and the same is hereby denied. ~~WXXMXXXXXXXXXXX~~.

Enter

HYMAN W. GAMSO
Clerk

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on June 12, 1973.

Present - Hon. Arthur Markewich,
Justice Presiding
Emilio Nunez
Myles J. Lane
Aron Steuer
Louis J. Capozzoli,
Justices

In the Matter of Michael S. a person alleged to be a juvenile delinquent, Respondent-Movant-Appellant.	:Affirmance :of Order :7068

An appeal having been taken to this Court by the respondent-movant-appellant from an order of the Family Court of the State of

New York, New York County (Guerreiro, J.), ~~from------an-order-of-the Supreme-Court,------County,~~ entered on March 28, 1973, which denied his motion for expungement, and said appeal having been argued by Mr. Jonathan A. Weiss of counsel for the appellant, and by Mr. Alfred Weinstein of counsel for the respondent; and due deliberation having been had thereon,

It is hereby unanimously ordered that the order so appealed from be and the same is hereby affirmed, without costs and without disbursements.

ENTER:

HYMAN W. GAMSO
Clerk.

At a Term of the
Family Court of the
State of New York,
held in and for
the county of NY
at 135 E. 22 St.
on MAR 28 1973

Present:

HON: /s/ Manuel G. Guerreiro
Judge

_____X

In the Matter of

Nancy A. Jacoby

Petitioner

Docket No. D631/69

-against-

ALL PURPOSE SHORT ORDER FORM

Michael Sp ncer

Respondent

_____X

Motion denied. No Opinion.

Enter:

signed: Manuel G. Guerreiro
Judge of the Family
Court

Clerk of Court
by
A. Torres

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CITY OF NEW YORK

In the Matter of MICHAEL S.,	
A Person Alleged to be a Juvenile Delinquent,	NOTICE OF MOTION
Petitioner.	
	D631/69

S I R S :

PLEASE TAKE NOTICE that the undersigned will move this Court at the Family Court House, 135 East 22nd Street, New York, New York, on the 21st day of March, 1973, at 9:30 o'clock in the morning of that day, or as soon as counsel can be heard for an order directing expungement of all court and police records.

Dated: New York, New York
March 6, 1973

JONATHAN A. WEISS
Attorney for
Petitioner
2095 Broadway
New York, New York
10023
Tel.: 595-1340

TO: Mr. Donald Fulcher
Clerk of the Family Court
135 East 22nd Street
New York, New York 10010

Norman Redlich
Attorney for Respondent
Municipal Building
New York, New York

FAMILY COURT OF THE
STATE OF NEW YORK
CITY OF NEW YORK:
COUNTY OF NEW YORK

In the Matter of MICHAEL S.,	:MOTION FOR ORDER :DIRECTING :EXPUNGEMENT OF :ALL COURT AND
A Person Alleged to be a Juvenile Delinquent,	:POLICE RECORDS : :D631/69 :
Petitioner.	:

Petitioner, MICHAEL S., moves this Court for an order directing the expungement of all court and police records relating to his arrest, trial, and adjudication in the above case as a person in need of supervision.

The determination of petitioner as a person in need of supervision was reversed by the Supreme Court of the State of New York, Appellate Division,

First Judicial Department on the grounds of failure to prove guilt beyond a reasonable doubt. This Court is empowered to expunge such records under the Family Court Act, §§783, 784 and §§721-724. In Re Smith, 310 N.Y.S.2d 617, (Family Court, City of New York, 1970). In Re Roz M., 33 A.D.2d 232, 306 N.Y.S.2d 716 (2nd Dept. 1970).

Such an order is necessary as the existence of such records is potentially prejudicial to petitioner in his seeking of future employment. The police, court and probation records raise misleading inferences of wrong doing, and access to them cannot practically be prevented.

Petitioner, having ultimately been found not guilty of any misconduct should not be subject to the stigma of having these records maintained. The keeping of these records indefinetely (sic) is an infringement of petitioner's basic constitutional guarantees of due process and equal protection, and is an impermissible invasion of his right to privacy.

Respectfully submitted,

/s/ Jonathan A. Weiss
JONATHAN A. WEISS
Attorney for Petitioner
2095 Broadway - Room 304
New York, New York 10023
Tel.: 595-1340